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Supreme Court, U.S.
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No. 94-527

In the Supreme Court of the United States

OCTOBER TERM, 1994

CHARLES BELLA, PETITIONER

v.

LEE CHAMBERLAIN AND CURTIS MEYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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1994

QUESTION PRESENTED

1. Whether the complaint failed to allege violation of a clearly established Fourth Amendment right against unreasonable seizure where the challenged force was used almost one hour before the seizure.

2. Whether the complaint failed to allege violation of a clearly established Fifth Amendment substantive due process right where the challenged force caused no physical injury, was concededly used without malice, and was not so disproportionate to the need as to shock the conscience.

3. Whether a complaint that fails to state a claim is properly dismissed prior to discovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 24 F.3d 1251. The opinion of the district court (Pet. App. 17a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1994. On August 8, 1994, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including September 17, 1994. The petition for a writ of certiorari was filed on September 19, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner brought this damage action pursuant to *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against respondents Lee Chamberlain and Curtis Meyers, two officers of the United States Customs Service. Petitioner alleged that respondents used excessive force in violation of his Fourth and Fifth Amendment rights in attempting to stop a helicopter piloted by petitioner while he was being held hostage at gunpoint by escaped convicts from a state penitentiary.

According to the complaint, the allegations of which the court of appeals assumed to be true, Pet. App. 1a, petitioner owned and acted as chief pilot for Bear Helicopters. On July 11, 1988, petitioner took off in his Aerospacial Gazelle helicopter from the Santa Fe, New Mexico, airport with a passenger, Beverly Shoemaker. Shoemaker had told petitioner she worked as a secretary to people interested in a parcel of real estate near Santa Fe, and she had arranged a flight over the real estate purportedly to look at it on their behalf. After Shoemaker and petitioner boarded the Gazelle, however, Shoemaker pulled out a gun and ordered petitioner to fly to the New Mexico State Penitentiary to assist in the escape of some inmates. Petitioner landed the helicopter in the prison yard, and three inmates boarded. Petitioner then took off, as ordered, and one of the inmates handcuffed him to the helicopter. *Id.* at 2a.

Petitioner flew to Los Lunas, New Mexico, and landed at the Mid-Valley Air Park. There, the inmates and Shoemaker got out, leaving petitioner handcuffed to the helicopter. A Customs Service Blackhawk helicopter, piloted by Chamberlain and carrying Meyers and another Customs Service agent, also landed at Mid-Valley. The

third agent, Ken Hebert, who is not a respondent, got out of the Blackhawk and approached the Gazelle.[1] One of the inmates then returned to the Gazelle, held a gun to petitioner's head, and ordered petitioner to take off. Hebert was less than ten yards from the Gazelle and was pointing an AR-15 semi-automatic rifle at the cockpit when petitioner took off. Chamberlain, who was in the Blackhawk, noticed that an escaped prisoner was trying to hide behind petitioner and use him as a shield; according to the complaint, Chamberlain then realized that petitioner was an innocent hostage. Pet. App. 2a-3a.

As petitioner attempted to take off, Chamberlain, with Meyers on board, hovered the Blackhawk directly in front of and above the Gazelle in an effort to keep it on the ground. Petitioner nevertheless managed to get the Gazelle in the air. As the Gazelle was leaving the Air Park, respondent Meyers fired three rounds from a semi-automatic weapon, one of which struck the Gazelle.[2] Chamberlain and Meyers then returned to the Air Park in the Blackhawk, picked up Hebert, and headed off after the Gazelle. The Gazelle was flying north in the direction of Albuquerque with petitioner and the armed inmate on board. Pet. App. 3a.

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[1] The petition incorrectly asserts that it was Meyers who left the Blackhawk and approached the Gazelle, Pet. 3; the complaint alleged that Hebert did so. See Pet. App. 2a.

[2] In his brief in the court of appeals, petitioner stated that the shot hit the skid of the helicopter as it was taking off. Pet. C.A. Br. 21 ("Agent Meyers fired three shots from a hovering helicopter at another that was taking off. Of the three shots fired, one hit the skids of [petitioner's] helicopter and the other two went wide."). The court of appeals held that the complaint could not reasonably be construed to have alleged that the shots were fired at petitioner personally. Pet. App. 11a n.8.

The Customs Service Blackhawk chased petitioner's Gazelle for forty to fifty minutes. Petitioner, following the armed inmate's orders, landed briefly at Coronado Airport in northern Albuquerque and took off again for Albuquerque International Airport. A New Mexico State Police helicopter then joined the chase, flying to the right of the Gazelle as the Blackhawk flew to the left, "box[ing] in" the Gazelle. The complaint alleges that the Blackhawk and the State Police helicopter flew "dangerously close" to the Gazelle, forcing petitioner to maneuver to avoid colliding with the pursuing helicopters. Petitioner finally landed the Gazelle at Albuquerque International Airport where he and the inmate were taken into custody. Pet. App. 3a.

2. Petitioner filed suit in July, 1991, alleging that respondent Meyers violated petitioner's Fourth Amendment rights by firing at and hitting the Gazelle helicopter when Meyers knew or should have known that petitioner was an innocent hostage. Petitioner also alleged that both respondents violated petitioner's Fifth Amendment rights when Meyers fired at, and hit, the Gazelle helicopter, and when Chamberlain flew the Blackhawk dangerously close to the Gazelle, endangering petitioner's life and safety, when they knew or should have known that petitioner was an innocent hostage. Pet. App. 3a-4a. Petitioner acknowledges that he "suffered no physical injury throughout the encounter." Pet. 4. The complaint alleged that petitioner suffered "mental anguish and distress" and incurred damage to his helicopter. Compl. 7.

Respondents each moved to dismiss, contending that the complaint failed to state constitutional claims, and that respondents were, in any event, entitled to qualified immunity. The district court denied respondents'

motions. The court held that the complaint stated a claim against respondent Meyers, who fired the shots, of violation of petitioner's Fourth Amendment right to be free from unreasonable seizure. The challenged actions, the court stated, "were alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purposes of effecting the seizure of the Gazelle's occupants," and those actions "contributed to [petitioner's] eventual seizure." Pet. App. 20a. The district court rejected respondent's reliance on the holding of *California* v. *Hodari D.*, 499 U.S. 621 (1991), that no seizure occurs until a fleeing person yields to authority, by concluding that "the facts in the present case are quite different." Pet. App. 19a.

The district court also held that the complaint stated a claim of use of excessive force by both respondents in violation of the Fifth Amendment. The court recited the three relevant factors as (1) the relationship between the amount of force used and that which is necessary under the circumstances; (2) the injuries received; and (3) the officials' motives. Pet. App. 20a-21a (citing *Hannula* v. *City of Lakewood*, 907 F.2d 129 (10th Cir. 1990)). The court analogized the case to one in which a Federal Bureau of Investigation agent was held to have used excessive force when he "gunn[ed] down an innocent hostage without reason or provocation." Pet. App. 21a (citing *Fernandez* v. *Leonard*, 784 F.2d 1209 (1st Cir. 1986)). The court held that the absence of allegations of malice was no more fatal to petitioner's claim than it was to the claim in *Leonard*, Pet. App. 21a, and that allegations of physical injury are likewise not required, *id.* at 21a-22a.

The court denied respondents qualified immunity on both claims. Reviewing "the objective reasonableness of

defendants' actions in light of the law clearly established at the time defendants acted," Pet. App. 23a, the court was "satisfied that, under facts pled by the plaintiff, qualified immunity is not available to the defendants under either the objective reasonableness [Fourth Amendment] or the substantive due process [Fifth Amendment] standards." Pet. App. 24a.

3. The respondents took an immediate appeal from the denial of qualified immunity, see *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and the court of appeals reversed. Pet. App. 1a-16a.[3]

The court of appeals held that "plaintiff fails to state a valid constitutional claim," Pet. App. 6a, and that it therefore did not need to reach the question whether petitioner had alleged "a violation of a 'clearly established . . . right[] of which a reasonable person would have known,'" *ibid.* (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The court of appeals explained that, to state a claim under the Fourth Amendment, petitioner would have to allege "both that a 'seizure' occurred and that the seizure was 'unreasonable.'" Pet. App. 6a (citing *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989)). Relying on *Hodari D.*, 499 U.S. at 625, the court held that the shots respondent Meyers fired at the helicopter did not result in a seizure because, although they constituted a show of authority, they did not cause petitioner to submit. Pet. App. 9a. The Fourth Amendment "prohibits unreasonable *seizures*, not unreasonable or ill-advised conduct in general," Pet. App. 10a (quoting *Cole* v. *Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993)). The court held that the alleged seizure occurred only when

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[3] The case was heard by a panel of the Tenth Circuit that included Associate Justice Byron R. White (Ret.), sitting by designation. Pet. App. 1a.

petitioner was finally taken into custody at Albuquerque International Airport. Pet. App. 10a. Petitioner did not challenge the constitutionality of that "actual" seizure. *Ibid.* The court noted that "[a] seizure is a single act, and not a continuous fact," *id.* at 9a (quoting *Hodari D.*, 499 U.S. at 625), and declined to find a separate Fourth Amendment violation based on events preceding the seizure by approximately an hour. Pet. App. 9a.[4]

Assuming without deciding that excessive force arising outside of the context of a seizure may give rise to a Fifth Amendment substantive due process claim, the court of appeals held that petitioner failed to state such a claim. Pet. App. 10a-15a. Respondents' alleged conduct of shooting at the Gazelle, and flying the Blackhawk "dangerously close" to petitioner's helicopter, did not amount to use of excessive force. That conduct was neither "inspired by malice" nor by "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience." Pet. App. 12a (quoting *Hewitt* v. *City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.), cert. denied, 474 U.S. 844 (1985)).

The court of appeals, like the district court, applied the three-factor test for excessive force claims set forth in the Tenth Circuit's opinion in *Hannula*. The court first concluded that petitioner's injury was minimal. He alleged neither physical injury, as required under Tenth

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[4] The court of appeals noted that "[o]bviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable," Pet. App. 10a n.7 (citing *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)), but held that the shooting challenged in this case "was not immediately connected with the actual seizure. Not only did the shooting occur one hour prior to the seizure, a lengthy helicopter chase intervened between the time of the shooting and the seizure." Pet. App. 10a n.7.

Circuit cases, nor the kind of "particularly egregious governmental conduct" that might have supported a due process claim in the absence of physical injury. Pet. App. 12a-13a.

Second, the complaint did not allege improper motive or malice, nor could malice be inferred from the alleged actions. Instead, petitioner "concede[d] that the officers were not inspired by malice," arguing instead that their actions "constituted 'unwise, excessive zeal amounting to an abuse of official power that shocks the conscience.'" Pet. App. 13a (quoting *Hewitt*, 758 F.2d at 1379).[5]

Third, the force petitioner alleged was not grossly disproportionate to the need. The court of appeals held that "[t]he officers' actions, which were taken in an attempt to force [petitioner] to land the Gazelle helicopter, undoubtedly constituted potentially deadly force, but not force 'grossly disproportionate' to the need presented." Pet. App. 14a. The court emphasized that "[t]o hold that [the use of potentially deadly force] in such circumstances violates the constitutional rights of a hostage whom the officers are trying to free would be to hamstring seriously law enforcement officers in their efforts to resolve explosive situations.'" *Id.* at 15a (quoting *Landol-Rivera* v. *Cruz Cosme*, 906 F.2d 791, 797 (1st Cir. 1990)).[6]

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[5] See Pet. C.A. Br. 19 ("though there are no allegations of malice, Defendants['] actions were, at least, inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience").

[6] The court rejected petitioner's contention that a Customs Service radar aircraft's visual and radar contact with the Gazelle rendered the use of force grossly disproportionate to the need presented. The officers need not have "sat idly by until the entire

The court of appeals rejected petitioner's contention that he was entitled to discovery before the complaint was dismissed. Pet. App. 15a n.10. The court reversed and remanded the case to the district court with instructions to dismiss the complaint. *Id.* at 16a.

ARGUMENT

1. Petitioner was taken into custody at the Albuquerque International Airport, and petitioner does not challenge the constitutionality of respondents' actions there. Pet. App. 10a. Petitioner argues instead that the federal officers' use of force in their initial, unsuccessful effort to stop petitioner's helicopter at Mid-Valley Air Park violated the Fourth Amendment. The actions petitioner challenges, however, amounted neither to a use of force against his person, nor a show of authority to which he submitted, and thus did not amount to a seizure. See *Hodari D.*, 500 U.S. at 626 (no arrest occurs unless there is either physical contact with the individual, or "*submission* to the assertion of authority"). Petitioner asserts that respondents used unreasonable force in hovering the Blackhawk helicopter close to petitioner's Gazelle, and firing at petitioner's helicopter in a failed effort to stop it from fleeing. Because those actions did not effect a seizure, the court

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episode came to a close, presumably when the Gazelle ran out of gas." Pet. App. 14a n.9. In the court's view, "[l]aw enforcement is not so narrowly restricted during such tense hostage crises." *Ibid.* Indeed, the court viewed it as arguable that the officers had an *obligation* to act as they did: Had the officers refrained from trying to stop the Gazelle, "the inmate possibly would have escaped, or worse yet, maimed or killed [petitioner]. In the latter scenario, we might very well be considering here whether the officers violated [petitioner's] rights by their *failure* to employ more active tactics." *Ibid.*

of appeals held that, under established law, they cannot support a Fourth Amendment claim.[7]

Petitioner contends that the decision below improperly "[r]estrict[s] the Fourth Amendment inquiry to the precise moment of seizure." Pet. 6. Contrary to petitioner's contention, however, the court of appeals expressly did not hold that assessment of the reasonableness of force used in effecting a seizure is limited to "the precise moment of seizure." Rather, the court stated that "[o]bviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable." Pet. App. 10a n.7. The court commented that the shooting did not bear on the reasonableness of the seizure here, however, because "[n]ot only did the shooting occur one hour prior to the seizure, a lengthy helicopter chase intervened between the time of the shooting and the seizure." *Ibid.*

Nor does the court of appeals' interpretation of *Hodari D.* conflict with this Court's decision in *Graham* v. *Connor*, 490 U.S. 386 (1989), as petitioner contends (Pet. 6-11). In *Graham*, police officers exerted force when they arrested, handcuffed, shoved and threw the arrestee with such force that he sustained a broken foot, cuts, bruised forehead and an injured shoulder. 490 U.S. at 389-390. *Graham* thus did not address the question petitioner seeks to present here regarding whether

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[7] Nor did petitioner even attempt to meet his burden to show that his rights were clearly established. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). His failure to do so once respondents asserted their qualified immunity is an additional reason review is unwarranted.

events that were both causally and temporally remote from the seizure bear on the seizure's reasonableness.[8]

Petitioner similarly errs in contending (Pet. 6) that the decision below conflicts with *Brower* v. *County of Inyo*, 489 U.S. 593 (1989). *Brower*, like *Graham*, did not address whether a use of force remote from the seizure rendered an otherwise peaceful arrest unconstitutional under the Fourth Amendment. In *Brower*, fatal force was exerted at the precise moment of the seizure. The police erected a roadblock by placing an 18-wheel tractor-trailer across a two-lane highway, behind a blind curve, in order to stop Brower by physical impact, and succeeded in doing so when he crashed into the roadblock and died. 489 U.S. at 594. Both the court of appeals here (Pet. App. 6a, 8a) and this Court in *Hodari D.*, 499 U.S. at 628, expressly took *Brower* into account, and found no conflict. As the *Hodari D.* Court explained, the Court in *Brower* "did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, that 'show of authority' did not produce his stop." 499 U.S. at 628.[9]

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[8] Petitioner contends (Pet. 10) that *Graham*, together with *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985), establishes a totality-of-the-circumstances test for assessing the reasonableness of a seizure. Consistent with that analysis, the court of appeals here acknowledged that force that is actually "connected" with a seizure may be considered in evaluating its reasonableness. Pet. App. 10a n.7.

[9] Petitioner argues that "conflicting decisions about the applicability of *Hodari* to civil liability cases * * * are proliferating," Pet. 11, but fails to identify any case actually in conflict with *Hodari D.* See *Alexander* v. *City & County of San Francisco*, 29 F.3d 1355, 1365 & n.10, 1366 (9th Cir. 1994) (fatal shooting of plaintiff constituted seizure in violation of the Fourth Amendment), petition for cert. pending, No. 94-876 (filed Nov. 14, 1994);

2. With regard to petitioner's substantive due process claim, the court of appeals assumed without deciding that use of excessive force outside the context of a seizure could be challenged under substantive due process principles. Pet. App. 11a. Petitioner does not contend that the court erred in the legal standard it employed. See *id.* at 20a-21a. Petitioner's challenge to the decision is limited to a dispute about the application of that test.

Petitioner contends that the court of appeals misapplied the legal standard by holding that physical injury is a prerequisite to a Fifth Amendment claim. Pet. 12-13. The court considered physical injury as only one relevant factor, however, and did not treat its absence as dispositive. Although it observed that the Tenth Circuit had not in the past upheld an excessive force claim "without some evidence of physical injury," Pet. App. 12a, the court nonetheless considered whether the conduct described in the complaint was sufficiently egregious to violate substantive due process even in the absence of physical injury. *Id.* at 13a-15a.[10]

Mouille v. *City of Live Oak*, 977 F.2d 924, 927 (5th Cir. 1992), (officer cocking his gun, shoving it in plaintiff's neck, and threatening to blow his head off "fall[s] under the broad definition of 'seizure'" even though officer was not arresting plaintiff), cert. denied, 113 S. Ct. 2443 (1993); *McDonald* v. *Haskins*, 966 F.2d 292, 292-293 (7th Cir. 1992) (officer holding a gun to a nine-year-old innocent child's head, making it clear that he was not free to move, constituted seizure); *Yates* v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) (shooting plaintiff and rendering him paraplegic effected unreasonable seizure).

[10] The cases cited by petitioner (Pet. 12-13) are consistent with the decision below. One of those cases held that there was no constitutional violation under the circumstances. See *Conner* v. *Sticher*, 801 F.2d 1266, 1269 (11th Cir. 1986). Two of the cases found that some physical injury occurred. See *Checki* v. *Webb*, 785

Petitioner further mischaracterizes the decision of the court of appeals as holding that "the intentional use of deadly force against an innocent hostage" fails to state a claim. Pet. 13. The court expressly acknowledged that deliberately shooting an unarmed hostage may amount to a use of grossly disproportionate force in violation of the Fifth Amendment, see Pet. App. 15a (citing *Fernandez* v. *Leonard*, 784 F.2d 1209, 1214-1215 (1st Cir. 1986)), but concluded that petitioner's factual allegations did not rise to that level. Petitioner conceded that respondents were not acting with improper intent, but rather argued that their actions constituted "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience." Pet. App. 13a. The court did not view the absence of intent as dispositive, but also considered whether the force used was "grossly disproportionate" to the need presented by the alleged circumstances, ultimately concluding that it was not. *Id.* at 14a-15a. Contrary to petitioner's contention, Pet. 13-14, the court

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F.2d 534, 536 (5th Cir. 1986) (police striking plaintiff in face with revolver caused "severe facial injuries"); *White* v. *Rochford*, 592 F.2d 381, 382 (7th Cir. 1979) (physical harm to child caused him to be hospitalized for a week). Three of the cases required particularly egregious governmental conduct that "shocks the conscience" to support a due process claim where physical injury was absent. See *Checki*, 785 F.2d at 538 (police use of vehicle to "terrorize a civilian" by "abuse of official power" that was "shocking to the conscience"); *Black* v. *Stephens*, 662 F.2d 181, 189 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (unprovoked action by police officer holding service revolver to motorist's head and threatening to shoot, with motorist's wife sitting behind him in the line of fire, was "conduct that shocks the conscience"); *White* v. *Rochford*, 592 F.2d at 383 (police officer's "unjustified and arbitrary" abandonment of three children of arrestee in a car on a busy highway on a cold evening, endangering them and causing physical and emotional injury, "shock[s] the conscience").

of appeals' approach does not conflict with any decision of any other court of appeals.[11]

3. Petitioner argues that the court of appeals erred in refusing to permit him to engage in discovery (Pet. 15), and thus made "ultimate factual determinations without the benefit of any evidentiary development of those facts." Pet. 16. The court of appeals, however, made no factual determinations; it accepted petitioner's factual allegations as true and held that the complaint failed to state a claim. That purely legal determination was a routine application of Federal Rule of Civil Procedure 12(b)(6). See *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977) ("In reviewing the sufficiency of a complaint in the context of a motion to dismiss we, of course, treat all of

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[11] See *Fagan* v. *City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (applying "shocks the conscience" standard to reject motorist's due process claim based on police officer's reckless pursuit of his vehicle through stop signs and red lights at high speeds in residential neighborhoods ending in motorist's fatal crash into truck); *Medina* v. *City of County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (rejecting claim of innocent bystander struck by vehicle of fleeing felon during high-speed chase because the pursuing law enforcement officers' conduct, though reckless, violated no clearly established right); *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989) (finding due process violation where plainclothes police officers, in absence of any reasonable suspicion, approached parked automobile at night with guns drawn and then shot motorist in the back when he started to drive away, leaving him permanently paraplegic); *Fernandez* v. *Leonard*, 784 F.2d at 1213-1214, 1215 (applying "shocks the conscience" standard to hold that evidence that police deliberately repeatedly shot an innocent hostage who never threatened the police or anyone else precluded summary judgment in favor or police); *Grandstaff* v. *City of Borger*, 767 F.2d 161, 166 (5th Cir. 1985) (sustaining claims against police who "maliciously, wantonly, or oppressively" mistook an innocent resident for a fugitive and shot him to death), cert. denied, 480 U.S. 916 (1987).

the well-pleaded allegations of the complaint as true."). This Court has repeatedly endorsed disposition of claims on the pleadings, where possible, in qualified immunity cases. See *Siegert* v. *Gilley*, 500 U.S. 226 (1991); *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978); see also *Elder* v. *Holloway*, 114 S. Ct. 1019, 1023 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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